A

PUBLIC BANK BHD v. JOHAN SHIPPING SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
ROHANA YUSUF JCA
B PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEALS NO: Q-02-1333-08-2014 & Q-02-1334-08-2014]
30 DECEMBER 2015

C ***BANKING:*** *Securities for advances – Charge – Company in liquidation – Fixed and floating charge created in favour of bank over vessels during pendency of restraining order – Vessels sold by liquidators – Whether charges were fixed charges – Whether vessels could only be sold with consent of bank – Failure to obtain consent – Whether bank entitled to proceeds of sale – Failure to file discharge of charge over vessel – Whether fixed charge valid and binding against chargor – Res* D *judicata – Whether applicable*

Johan Shipping Sdn Bhd ('the respondent') was granted banking facilities secured by seven debentures which created fixed and floating charges over its assets. The respondent defaulted in repayments of the banking facilities. Subsequently, the respondent went into voluntary liquidation and a E restraining order was granted against the creditors of the respondent pursuant to s. 176(10) of the Companies Act 1965 ('CA'). During the pendency of the restraining order, the appellant and the respondent entered into an agreement to restructure and reschedule the banking facilities. Fixed and floating charges were therefore created by the respondent in favour of the appellant F over six vessels as additional security. The liquidator for the respondent sold five of the vessels and the appellant therefore claimed for the proceeds of sale by virtue of the security held. The respondent, *vide* an originating summons sought, *inter alia*, a declaration that the debenture created over the six vessels was null and void and therefore unenforceable ('first OS'). The application G was dismissed by the High Court. However, the Court of Appeal allowed the respondent's appeal holding that the basis for the first OS was to declare the post debenture null and void as its creation contravened s. 176(10C) of the CA. In the application which was the subject matter of the appeal herein, a declaration was sought as to the pre-existing debentures and whether they remain afoot and issues relating to their validity and as to whether they had H been discharged or not were not issues that were dealt with or could have been dealt with in the first OS.

Held (dismissing appeals with costs)
Per Prasad Sandosham Abraham JCA delivering the judgment of the court:

I **(1)** The question of validity of the persisting debentures and whether they had been discharged could not have been raised as an issue in the first OS which dealt with the post debenture. Hence, *res judicata* did not apply in this case. (para 11)

(2) As the charges were over ships, registration with the Registry of Shipping under the Merchant Shipping Ordinance 1952 as well as with the Registrar of Companies ('CCM') would be required and the registration would have to be effected in both registries. The documents filed at the respective registry clearly showed that the particulars of the charges created pointed to a mortgage on each of the vessels and that would be deemed notice to all sundry. (para 15)

(3) The debentures and the schedules clearly showed that they were fixed charges over each of the vessels. A fixed charge fastens on to each vessel immediately and the vessels were caught by the charge. The words used in the seven debentures also pointed to the same being fixed charges. Therefore, each of the vessels could only be sold with the consent of the bank and if no consent was forthcoming, the bank would be entitled to claim for the proceeds of the sale. (paras 14 & 16)

(4) In view of the dual registration system, a discharge and satisfaction of charge would have to be filed at the Registry of Shipping and also with the CCM pursuant to s. 113 of the CA. The five vessels had been fully discharged as evidenced by the filing of the discharge pursuant to s. 113 of the CA. The failure to file the discharge of charge in respect of a vessel named Johan Emerald left the fixed charge on Johan Emerald intact and therefore, the charge on the vessel remained. The fixed charge was valid and binding against the respondent and the appellant was therefore entitled to its claim (paras 18-21).

Bahasa Malaysia *Headnotes*

Johan Shipping Sdn Bhd ('responden') diberikan kemudahan perbankan yang dijamin oleh tujuh debentur yang membentuk gadaian tetap dan terapung terhadap aset-asetnya. Responden ingkar dalam pembayaran balik kemudahan perbankan tersebut. Kemudian, responden memasuki likuidasi secara sukarela dan perintah sekatan diberikan terhadap pemiutang-pemiutang responden menurut s. 176(10) Akta Syarikat 1965 ('Akta'). Semasa perintah sekatan masih berkuat kuasa, perayu dan responden memasuki perjanjian untuk menyusun dan menjadualkan semula kemudahan perbankan. Gadaian-gadaian tetap dan terapung oleh itu dibentuk oleh responden bagi pihak perayu terhadap enam kapal sebagai jaminan tambahan. Pelikuidasi bagi responden menjual lima daripada kapal tersebut dan perayu, oleh itu, menuntut hasil jualan berikutan jaminan yang dipegangnya. Responden, melalui saman pemula memohon, antara lain, satu deklarasi bahawa debentur yang dibentuk terhadap enam kapal tersebut tidak sah dan terbatal dan oleh itu, tidak boleh dikuatkuasakan ('OS pertama'). Permohonan tersebut ditolak oleh Mahkamah Tinggi. Walau bagaimanapun, Mahkamah Rayuan membenarkan rayuan responden memutuskan bahawa asas bagi OS pertama adalah untuk mengisytiharkan pasca debentur sebagai batal dan tidak sah kerana pembentukannya mencanggah s. 176(10C) Akta.

Dalam permohonan yang menjadi perkara rayuan di sini, satu deklarasi dipohon berkaitan dengan debentur wujud sebelumnya dan sama ada ia kekal sah dan isu-isu berkaitan kesahan dan sama ada ia telah dilepaskan atau tidak, bukan isu-isu yang diputuskan atau boleh diputuskan dalam OS pertama.

Diputuskan (menolak rayuan-rayuan dengan kos)
Oleh Prasad Sandosham Abraham HMR menyampaikan penghakiman mahkamah:

(1) Persoalan tentang kesahan debentur berterusan dan sama ada ia dilepaskan tidak mungkin boleh dibangkitkan sebagai isu dalam OS pertama yang berkaitan dengan pasca debentur. Oleh itu, *res judicata* tidak terpakai dalam kes ini.

(2) Oleh sebab gadaian-gadaian adalah atas kapal-kapal, ia perlu didaftar dengan Pendaftar Perkapalan di bawah Ordinan Perkapalan Saudagar 1952 dan juga dengan Pendaftar Syarikat ('SSM') dan pendaftaran tersebut perlu dimasukkan dalam kedua-dua daftar. Dokumen-dokumen yang difailkan dalam daftar-daftar tersebut menunjukkan bahawa butiran gadaian yang dibentuk menunjukkan gadai janji ke atas setiap kapal dan ia dianggap sebagai notis kepada semua.

(3) Debentur-debentur dan jadual-jadual jelas menunjukkan ia adalah gadaian tetap terhadap setiap satu kapal. Gadaian tetap mengikat setiap kapal dengan serta merta dan kapal-kapal tersebut terikat dengan gadaian yang dibentuk. Perkataan-perkataan yang digunakan dalam tujuh debentur itu juga menunjukkan ia adalah gadaian tetap. Oleh itu, setiap satu kapal hanya boleh dijual dengan persetujuan bank dan jika tiada persetujuan diberikan, bank berhak menuntut hasil jualannya.

(4) Melihat kepada sistem dwi-pendaftaran, pelepasan dan penyelesaian gadaian perlu ditunjukkan difailkan dalam Daftar Perkapalan dan juga dengan SSM menurut s. 113 Akta. Lima kapal telah dilepaskan gadaian seperti yang dibuktikan oleh pemfailan menurut s. 113 Akta. Kegagalan memfailkan pelepasan gadaian berkaitan dengan sebuah kapal yang dikenali sebagai Johan Emerald menjadikan gadaian tetap bagi Johan Emerald tidak terjejas dan oleh itu, gadaian tersebut kekal. Gadaian tetap itu adalah sah dan mengikat terhadap responden dan oleh itu, perayu berhak kepada tuntutannya.

Case(s) referred to:
KL Engineering Sdn Bhd & Anor v. Arab Malaysia Finance Bhd [1994] 2 CLJ 480 SC ***(refd)***
Kok Hoong v. Leong Cheong Kweng Mines Ltd [1963] 1 LNS 61 PC ***(refd)***
Malayan United Finance Bhd v. Noormurni Sdn Bhd & Anor [1988] 1 CLJ 149; [1988] 1 CLJ (Rep) 190 SC ***(refd)***
Malaysian International Merchant Bankers Bhd v. Highland Chocolate Confectionery Sdn Bhd & Anor (No 2) [1998] 4 CLJ Supp 32 HC ***(refd)***
Tong Lee Hwa & Anor v. Lee Yoke San [1978] 1 LNS 218 FC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 108, 113, 176(10), (10C)
Merchant Shipping Ordinance 1952, s. 37

For the appellant - George Lo (Wong Li Ching with him); M/s George Lo & Partners
For the respondent - Sim Hui Chuang (Lim Lip Sze with him); M/s Reddi & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: KCH-24-182-12-2013 (affirmed).]

Reported by S Barathi

JUDGMENT

Prasad Sandosham Abraham JCA:

[1] We heard both these appeals together in the sitting of the court at Kuching on 21 August 2015. Having heard the submissions of the respective counsels we reserved judgment in respect of both appeals. We now deliver our decision and grounds subject to submissions on costs.

Background Facts

[2] We will refer to the respective parties by name. The facts are elucidated from the judgment of the learned judge and the submission of respective parties.

[3] Johan Shipping Sdn Bhd (hereinafter referred as "Johan") is a wholly owned subsidiary of Swee Joo Berhad and at all material times Johan and several subsidiaries of Swee Joo were customers of Hock Hua Bank, Public Bank's predecessor. Particulars of the facilities are found in Appeal Record Part C Volume 2(2) pp. 112 to 114.

[4] These banking facilities were secured by seven debentures which created fixed and floating charges over the assets of Johan. Johan has defaulted in repayments of the various banking facilities granted to them; and Public Bank contended that as at 31 December 2011, the total amount outstanding due to them was RM97,914,414.91. The said debentures are found in the appeal record page as follows:

Debentures	Exhibited Herein Collectively As
Debenture dated 14.8.1996	PBB-2 (AR Part C2(2) p. 115-166) NB: Clause 4.01(b) Schedule II (p. 161)
General Debenture 2 dated 25.10.2005	PBB-8 (AR Part C2(2) p. 236-266) NB: Clause 2.02 p. 241
General Debenture 3 dated 11.1.2006	PBB-9 (AR Part C2(3) p. 281-309)
General Debenture 4 dated 20.3.2006	PBB-10 (AR Part C2(3) p. 328-369)

General Debenture 5 dated 2.5.2006	PBB-11 (AR Part C2(3) p. 383-473) NB: Clause 3.02 1(a) p. 393
General Debenture 6 dated 28.11.2006	PBB-12 (AR Part C2(3) p. 451-484) NB: Clause 5.01 p. 460
General Debenture 7 dated 12.3.2007	PBB-13 (AR Part C2(4) p. 497-528)

[5] On 8 August 2011 Johan went into voluntary liquidation and a restraining order was granted against the creditors of Johan's pursuant to s. 176(10) of the Companies Act 1965 which lapsed on 7 July 2012 (see Appeal Record Part C2(4) p. 650).

[6] During the pendency of the restraining order, Public Bank and Johan entered into an agreement to restructure and reschedule the banking facilities wherein fixed and floating charges were created by Johan in favour of Public Bank over six vessels as additional security (last debenture). The said debenture is found in the Appeal Record Part C 2(5) at pp. 681 to 702.

[7] The liquidator of Johan sold five of the vessels amounting to RM20,500,000,00 and Public Bank lays claim to the proceeds of sale by virtue of their security that they hold. This court has ruled the additional security by virtue of the post-debenture over the six vessels were null and void (see Appeal Record Part C 2(5) p. 871).

Findings

First Originating Summons

[8] After Johan went into voluntary liquidation the liquidator sold five of the vessels for RM20,500,000. Public Bank had demanded that the proceeds of sales be handed to them by virtue of their security. Johan filed an originating summons seeking *inter alia* a declaration that the debenture created over the six vessels was null and void and therefore unenforceable. The High Court dismissed the said originating summons on 22 of April 2013, Johan appealed to the Court of Appeal and the appeal was allowed on 8 October 2013. Leave to the Federal Court to appeal against the decision of the Court of Appeal is still pending (see Appeal Record Part C2(5) pp. 713-723).

[9] Counsel for Johan in this appeal raised the point of *res judicata*. Having looked at the first originating summons as opposed to the current application, it is clear that the basis for the first originating summons was to declare the post-debenture null and void as its creation contravened s. 176 (10C) of the Companies Act 1965 and the Court of Appeal held so. In the present application, which is the subject matter of this appeal, a declaration is sought as to the pre-existing debentures and whether they remain afoot and issues relating to their validity and to whether they have been discharged or not are not issues that were dealt with or could have been dealt with in the first

originating summons. (see *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1963] 1 LNS 61; [1964] 1 MLJ p. 48) and *Tong Lee Hwa & Anor v. Lee Yoke San* [1978] 1 LNS 218; [1979] 1 MLJ p. 24, a decision of the Federal Court. The Federal Court held and we quote:

> It had not been shown that the earlier judgment necessarily and with precision determined the point in issue, that is, the liability of the appellants to pay the respondent for work done at their request and therefore the plea of *res judicata* must fail.

[10] We refer to the decision of the Supreme Court in *Malayan United Finance Bhd v. Noormurni Sdn Bhd & Anor* reported in [1988] 1 CLJ 149; [1988] 1 CLJ (Rep) 190; [1988] 1 MLJ 395 at p. 191 (CLJ); p. 396 (MLJ) of the report ie, the judgment of Wan Suleiman SCJ (as he then was) and we quote:

> We agree with the learned judge that "issue estoppel" can arise even where a plea of *res judicata* cannot be established because the causes of action are not the same.
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> *Halsbury's Laws of England* - 4th Ed. Vol. 16 paragraph 1530 succinctly sets out the law, which is cited hereunder:
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> > *A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law. The conditions for the application of the doctrine have been stated as being that (1) the same question was decided in both proceedings; (2) the judicial decision said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. Where one party has raised an issue which his opponent alleges is barred by issue estoppel the opponent can either plead the estoppel and leave the matter to be dealt with at the trial, or he can attempt to have the offending plea struck out*. (emphasis added)

We do not, in this case, find there has been a breach of the principle of *interest reipublicae ut sit finis litium*.

[11] The question of the validity of the persisting debentures and whether they have been discharged could not have been raised as an issue in the first originating summons which dealt with the post-debenture. We therefore agree with the learned judge, *res judicata* does not apply in this case and affirmed her finding accordingly.

[12] We now turn to the arguments on the merits. The six persisting debentures and the necessary registrations are found in Appeal Record Part C. All the six debentures sought to create fixed charges over vessels belonging to Johan. Below are the details of the debentures and its registration:

Debentures	Registration
	CCM
General Debenture 2 dated 25.10.2005	Registered as charge No. 038 dated 24.11.2005 (see AR Part C 2(2) p. 264)
General Debenture 3 dated 11.1.2006	Registered as charge No. 038 dated 27.1.2006 (see AR Part C 2(3) p. 310)
General Debenture 4 dated 20.3.2006	Registered as charge No. 042 dated 30.3.2006 (see AR Part C 2(3) p. 367)
General Debenture 5 dated 2.5.2006	Registered as charge No. 043 dated 16.5.2006 (see AR Part C 2(3) p. 435)
General Debenture 6 dated 28.11.2006	Registered as charge No. 049 dated 30.11.2006 (see AR Part C 2(4) p. 482)
General Debenture 7 dated 12.3.2007	Registered as charge No. 054 dated 14.3.2007 (see AR Part C 2(4) p. 526)

	Registration Of Statutory Mortgages At Shipping Registry
JOHAN EMERALD	27.2.1998 (see AR Part C 2(2) p. 173-174)
MEGAH JAYA DUA	8.2.2001 (see AR Part C 2(2) p. 181-182)
JOHAN STAR	25.4.2003 (see AR Part C 2(2) p. 173-174)
JOHAN BRIGHT	3.12.2003 (see AR Part C 2(2) p. 211-212)
JOHAN AMBER	29.11.2001 (see AR Part C 2(2) p. 223-224)
JOHAN CRYSTAL DUA	9.5.2000 (see AR Part C 2(6) p. 1017)

[13] First we would have to determine whether the charges created under the persisting debentures created a fixed charge over the vessels or a floating charge. To determine whether it is a fixed charge or a floating charge, it would mean looking at the effect of the said clause on the asset, not the phraseology used. For instance although a charge could be worded in terms of it being fixed, it was in effect a disguised floating charge. The distinction is important for if the court was to construe the charge as floating, different consequences would follow.

[14] Looking at each of the debentures and the schedules, it is clear they are fixed charge over each of the vessels. A fixed charge fastens on to each of vessels immediately and there can be no doubt the vessels are caught by the charge (see *Malaysian International Merchant Bankers Bhd v. Highland Chocolate Confectionery Sdn Bhd & Anor (No 2)* [1998] 4 CLJ Supp 32 at p. 47 and we quote the judgment of Abdul Malik Ishak J (as he then was) at p. 47 (and we agree):

> Be that as it may, the plaintiff's fourth charge is in the nature of a fixed charge and that being the case it attaches immediately to all the assets of the 1st defendant in existence at the date of the creation of the charge. The assets of the 1st defendant would include the land as set out in the debenture and all the other assets of the 1st defendant at the date of the creation of the charge as seen at pp. 92 to 134 of encl. 2 of the paginated copy of the plaintiff's counsel or in exh. "B" of encl. 2. *It is said that a specific or fixed charge attaches to a particular piece of property, like a leech, which is identified when the charge is created, and the identity of the property does not change, although it may be extended, during the subsistence of the charge*. Examples of them are abound. To name one of them would be the striking example of the legal and equitable mortgages of land owned by a company when the mortgage is created. In my judgment, it is not necessary that the property should exist when the charge is created or that the company should then own the property. Suffice that the property or the class of assets to which it belongs is sufficiently defined in the instrument creating the charge so that there can be no doubt that the property is caught by the charge (*Tailby v. Official Receiver* [1888] 13 App Cas 523 at 533, per Lord Watson; and *Re Yorkshire Woolcombers' Association Ltd* [1903] 2 Ch 284 at 294 per Vaughan Williams LJ). In the instant case, the property and assets are sufficiently defined in the debenture to enable the plaintiff to act accordingly. In my judgment, the plaintiff's charge attached immediately upon the property and the assets at the date of the creation of the charge and that would be on 23 October 1993. The reason is simple. **The plaintiff's charge is a fixed charge and therefore no crystallisation is necessary. In my judgment, the debenture would bite on the property and the assets the minute it was created.** (emphasis added)

A floating charge is however ambulatory in nature and fastens onto assets on crystallisation. So if for instance the vessels had been sold before crystallisation, the bank claim could not be sustained.

[15] As the charges are over ships, registration would also be required with the Registry of Shipping under the Merchant Shipping Ordinance 1952 (see s. 37) and also with the Registrar of Companies under the Companies Act 1965 (see s. 108). Malaysia is a dual registration jurisdiction unlike some jurisdictions in Australia and registration would have to be effected in both registries (see WJ Gough *Company Charges*, pp. 884-885). Looking at the documents filed at each respective registry it is clear that the particulars of the charges created all point to a mortgage on each of the vessels and that would be deemed notice to all sundry. (See *KL Engineering Sdn Bhd & Anor v. Arab Malaysia Finance Bhd* [1994] 2 CLJ 480; [1994] 2 MLJ 201).

[16] The question of whether a charge created by a company under an instrument is a fixed or floating charge turns on the construction of a particular instrument and/or instruments. The subjective intentions of parties to the instrument is irrelevant. To our mind, the words used in the seven debentures point to the same being fixed charges and we so find. The effect of that finding would be that each of the vessels was caught by the fixed charge could only be sold with the consent of the bank and if no consent was forthcoming, the bank would be entitled to claim for the proceeds of sale.

[17] Johan Shipping has raised the issue that all the fixed charges over the vessels have been discharged and therefore the bank was no longer a secured creditor by way of fixed charges over the vessels.

[18] In view of the dual registration system in force, a discharge and satisfaction of charge would have to be shown filed at the Registry of Shipping and also with the Registry of Companies (CCM) pursuant to s. 113 of the Companies Act 1965 and we set out s. 113 for easy reference.

> Section 113. Entries of satisfaction and release of property from charge.
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> (1) Where, with respect to any registered charge:
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> (a) the debt for which the charge was given has been paid or satisfied in whole or in part; or
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> (b) the property or undertaking charged or any part thereof has been released from the charge or has ceased to form part of the company's property or undertaking of the company concerned,
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> *the company shall, within fourteen days after the payment, satisfaction, release or cessation referred to above, lodge with the Registrar in the prescribed form a memorandum of satisfaction in whole or in part, or of the fact that the property or undertaking or any part thereof has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be, and the Registrar shall enter particulars of that memorandum in the register.*
>
> (2) *The memorandum must be supported by evidence sufficient to satisfy the Registrar of the payment, satisfaction, release or ceasing referred to in subsection (1).*
>
> (emphasis added)

[19] It is clear that the section implies a duty on Johan to satisfy the Registrar that the secured debentures has been satisfied and a memorandum of discharge filed and failure to do so renders the charge effective against the liquidator of Johan Shipping. From a reading of s. 113, this clearly is not a "rubber stamp" section as the section places a duty on the company to produce sufficient evidence to satisfy of the Registrar of Companies that the monies due under any given particular charge had been satisfied. It is our view failure to file the discharge of charge in respect of Johan Emerald leaves the fixed charge on Johan Emerald intact.

[20] It appears from the facts that whilst the charges on five of the vessels have been fully discharged as evidenced by filing of the discharge in the Registry of Shipping and in CCM pursuant to s. 113 of the Companies Act 1965 (see Appeal Record Part C(2(6) pp. 971-1018) however the charge on the vessel named Johan Emerald remains as the discharge of charge as required under s. 113 had not been filed (see Appeal Record Part C(2(6) pp. 970-975). It therefore follows that the fixed charge remains and is valid and binding against Johan Shipping.

[21] Johan argued that the bank should be estopped from claiming itself to be a secured creditor and has made reference to affidavits filed and the documents of discharge. Whilst we observed that this may have been done in anticipation of the post-debenture, the fact remains that the fixed charges over Johan Emerald and all the proceeds of sales had not been discharged, and it therefore follows that the Public Bank would be entitled to its claim for RM600,000 as found by the learned judge.

[22] Had this debenture been construed as a floating charge, the crystallisation of these charges takes place upon the winding up of Johan, and if the vessels had been sold before crystallisation, Public Bank would not have a claim for the proceed of sales of each of the vessels. *In lieu* of our finding that they are fixed charges, the rights of Public Bank to the proceeds of sales of Johan Emerald remains.

[23] In view of that, on the upshot, the appeal of the Public Bank in (Appeal 1333) is dismissed with costs and the finding of the learned judge is affirmed. The Appeal 1334 ie, the appeal of Johan Shipping Bhd, is also dismissed with costs and the order of the learned judge is also affirmed. In both appeals, we award the sum of RM20,000 as costs for each appeal to the respondents.